IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 0036 of 2018

In the matter between

BANYA TONNY **APPELLANT**

And

OPIO CHARLES **RESPONDENT**

Heard: 20 March, 2020
Delivered: 22 May, 2020.

Civil Procedure *— Order 43 rule 1 (2) of The Civil Procedure Rules — Grounds of appeal must not be argumentative, vague or general in terms. They should be stated concisely without any argument or narrative. A ground contains narrative when apart from specifying the points considered to have been wrongly decided, it also contains averments that seek to illustrate or contextualize the point or when it contains evaluative averments suggesting a desired conclusion, or includes inferences and characterisations of facts.*

Land Law *— Boundaries — It is trite that each parcel of land must be delimited by a boundary. Whereas the physical demarcation of boundaries includes any activity for identifying a parcel of land and delineating its boundaries, performed by any of the parties related to the parcel, legal demarcation consists of reaching a social consensus on physical demarcation, such that it will be enforced in rem. A boundary line must have certain physical properties such as visibility, permanence, stability and definite location.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant for recovery of approximately twenty acres of land situated at Te-Opok village, Parak Parish, Lakwana sub-county, Omoro county in Gulu District, a declaration that he is the rightful customary owner of the land, general damages for trespass to land, a permanent injunction restraining the appellant's activities on the land and the costs of the suit. His claim was that the land in dispute was originally owned by his late grandfather Igwali Luka. It was inherited by his father, Igwali Okot during the 1960s. Upon his father's death, the respondent inherited the land and occupied it henceforth peacefully until, the year 2007 when the appellant began encroaching onto it by cutting down trees, undertaking brick-making and subsequently construction of a house. The respondent made several unsuccessful attempts at a mutual settlement of the resultant dispute.

[2] In his written statement of defence, the appellant refuted the respondent's claim and stated that he "inherited the land from his father Ayoo Stephen who is still resident on the land." He contended that the land in dispute is his ancestral home since it originally belonged to his father, Ayoo Stephen. The appellant was born on that land in 1957 and has lived thereon since then. During his lifetime, his father, Ayoo Stephen gave the land in dispute to the appellant as a gift inter vivos. The respondent is a neighbour to the West of that land and has no rightful claim to it. The respondent began laying claim to the land in dispute after selling off his entire land to three different persons during the year 2007. The common boundary between his land and that of the respondent has existed since the year 1963.

The appellant's evidence in the court below:

[3] D.W.1 Banya Tonny, the appellant, testified that he was born on the land in dispute during the year 1957. When he married a wife during the year 1976, his father gave him thirty acres of the land to raise a family. He has utilised the land

in dispute since the year 1977. It is during the year 2016 that he constructed a house on the land. Mango trees that exist on the land were planted in 1979 and they do not belong to the respondent's father. The respondent is a neighbour to the West of the land in dispute. The common boundary between the respondent's adjoining land and his is an *Olam* tree.

[4] D.W.2 Ayoo Stephen, the appellant's father, testified that he inherited land from his late father Okello Noah and the appellant was born on the land in dispute during the year 1957. It is him who gave the appellant thirty acres of that land, part of which is now in dispute, when the latter married a wife. The appellant has about nine houses on the land. The land was not given to him by the respondent's grandfather, who was only an owner of adjoining land. The respondent's father did not plant any trees on the land. It is him who planted trees on the land; cashew nuts and orange trees during the year 1963, and mango trees in the year 1964. The common boundary between his land and that of the respondent is a banana plantation. The respondent filed the suit only because he has sold off most of his land.

The respondent's evidence in the court below:

[5] P.W.1 Opio Charles, the respondent, testified that the land in dispute was originally owned by his late grandfather Igwali Luka. It was inherited by his father, Igwali Okot during the 1960s. Upon his father's death, the respondent inherited the land and occupied it henceforth peacefully until, the year 2007 when the appellant began encroaching onto it by cutting down trees, undertaking brick-making and subsequently construction of a house. His grandfather Igwali Luka, gave the appellant's father, Ayoo Stephen, approximately 15 acres of land to live on but the appellant crossed the boundary and encroached onto the respondent's land. The boundary is marked by mango trees, a *Mvule* tree, and orange trees planted by Gunya John and Akullo Evalyne. P.W.2 Odongo Patrick testified that he is one of the immediate neighbours to the land in dispute. Igwali Luka gave

Ayoo Stephen the approximately four acres occupied by the later. It is the appellant who trespassed onto the respondent's land.

Proceedings at the *locus in quo*:

[6] The court visited the *locus in quo* on 21st March, 2018 and by order of this court re-visited it on 19th December, 2019 because the record of the initial visit was missing. The trial court had indicated in its judgment that during the first visit, it had recorded evidence from one of the neighbours, Odaga Partick. On the second visit, the court formed the opinion that the land in dispute measures approximately ten acres, forming part of the approximately 30 acres claimed by the respondent. The appellant demonstrated to court line of trees comprising two *Olam* trees and multiple *Madalena* trees is to the East of the land as the common boundary between his land and that of the respondent. The respondent refuted that as the boundary and contended instead that the boundary is marked by the pine trees planted by the appellant, separating the land in dispute from that of the Okello Obong, to the North, which is quite far from the respondent's land. The respondent had no activity within 100 meters of either boundary. The appellant had his homestead on the land and each of his two sons had a homestead thereon. They had gardens of seasonal crops growing on the land and pine trees separating the land from Okello Obong, their immediate neighbour to the North. A sketch map was drawn illustrating that the land in dispute is occupied by the appellant and his sons. Fruit trees, like mango trees, and hard wood trees, like *Mivule* trees, are scattered within the area in dispute. A line of trees comprising two *Olam* trees and multiple (over twenty five) *Madalena* trees is to the East of the land separating the land in dispute from the respondent's land. Pine trees separate the land in dispute from that of Okello Obong, the immediate neighbour to the North.

Judgment of the court below:

[7] In his judgment delivered on 9th May, 2018 the trial Magistrate found that the appellant did not offer a plausible explanation as to how he had acquired the land in dispute. When the court visited the *locus in quo*, it observed that the land occupied by the appellant was much smaller in comparison to that occupied by the respondent. The appellant claimed to have inherited the land from his father, Ayoo Stephen, yet he was still alive. At the same time he claimed to have been given the land as gift *inter vivos* in 1977 when he married, which is inconsistent with the first mode of acquisition. Accordingly, the respondent proved to the required standard that the land in dispute belongs to him. He was thus declared the rightful owner of the land, a permanent injunction was issued against the appellant and the respondent was awarded shs. 10,000,000/= as general damages for trespass to land and the costs of the suit.

The grounds of appeal:

[8] The appellant was dissatisfied with that decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact when he engaged in conjecture, speculation and fanciful theorising, hence misdirected himself that the appellant never acquired the disputed land as a gift *inter vivos* from his father who is still alive and yet his evidence was received by court, hence came to a wrong conclusion, thus occasioning a miscarriage of justice.
2. The learned trial Magistrate erred in law and fact in failing to consider the weight of evidence of the appellant vis-a-vis the evidence of the respondent and his witnesses that departed from the respondent's claim before court and holding that the respondent is the owner of the suit land, whereas not, thereby occasioning a miscarriage of justice.

3. The learned trial Magistrate erred in law and fact when he failed and / or ignored the evidence of the appellant found at the *locus in quo*, thereby descending into the arena and soliciting evidence that supports the respondent's case, hence occasioning a miscarriage of justice to the appellant.

Arguments of Counsel for the appellant:

[9] In his submissions, counsel for the appellant, submitted that D.W.2 Ayoo Stephen the father of the appellant, testified but the court limited itself to the written statement of defence of the appellant and held the appellant did not own the suit land, only because he had pleaded inheritance. He had no title by inheritance. The court should have found it was by gift although there was no amendment to the pleadings. The appellant admitted his father is still alive. The court should have found that the appellant obtained the land as a gift *inter vivos* as it was clear he said the father was still alive. Issues may arise on evidence even when not pleaded, such that court should consider them. Court should have construed that he got the land as a gift. The pleading was an error. The error should have been corrected or overlooked. P.W.2 made statements based on hearsay. That he had heard that the respondent's father had land. P.W.1 stated he did not know the size of the land.

[10] The judgment is based solely on the statement of the respondents and thus came to the wrong conclusion. The Court found that the two modes are inconsistent i.e. inheritance and gift. He ignored the evidence of D.W.2 who testified that he gave land to his son, the appellant. This led to a miscarriage of justice. The trial magistrate did not verify the evidence of the appellant at the *locus in quo*. D.W.2 stated that the appellant had a house on the suit land. The respondent did not plant the trees but it is D.W.2 who planted the trees. There is a boundary, a bit teak tree. The trial magistrate should have tested that evidence by looking out for this features for confirmation of the evidence of both. He

descended into the arena and solicited evidence in support of the respondent's case, which defeated the purpose of the *locus in quo*. There is no map as part of the proceeding of the court at the *locus in quo*. The map was necessary to demonstrate the extent of the alleged encroachment. This caused a miscarriage of justice to the appellant. He submitted that the court allows the appeal and sets aside the decision of the lower court in favour of the appellant and awards the costs of the appeal to the appellant.

Arguments of Counsel for the respondents:

[11] In response, counsel for the respondent, submitted that the appellant in his witness statement stated that it is upon marriage that his father gave him about thirty acres. In the same statement he stated that the land given to him was not the area in dispute. Under cross-examination he stated that he married in 1976 and that he was shown a different piece of land. It is re-examination that he said that the land in dispute was the one given to him by his father. He said it was only last year, 2015 that he constructed a house on the land. He intruded into the neighbouring land. As regards possession, the respondent stated in his pleadings that in 2007 is when the encroachment began. The respondent testified that there were mango trees, *Mivule* and orange trees on the land. The appellant then said that there were two thick *Olam* trees on the land. His contradiction should result is disregarding or giving little weight to his evidence. On the other had the respondent from his pleadings and examination in chief he was very clear on how he acquired the land. His acquisition was not challenged in any way. The appeal therefore should be dismissed.

Duties of a first appellate court:

[12] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father*

Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; *[2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[13] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

Argumentative grounds of appeal: Grounds one, two and three

[14] Before dealing with the grounds raised, it is imperative to address some preliminary matters. The purpose of a memorandum of appeal is to define clearly the issues presented for the appellate court's consideration. The last thing an advocate should do is to draft grounds of appeal that are long and cluttered. According to Order 43 rule 1 (2) of *The Civil Procedure Rules*, grounds of appeal must not be argumentative, vague or general in terms. They should be stated concisely without any argument or narrative. They are limited to specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of a second appeal, the points of law, and in a third appeal the matters of law of great public or general importance, which are considered to have been wrongly decided. A ground contains narrative when apart from specifying the points considered to have been wrongly decided, it also contains averments that seek to illustrate or contextualise the point. An argument is merely a set of

statements positing premises ending with one which is designated as the conclusion. A ground of appeal is considered argumentative when it contains evaluative averments suggesting a desired conclusion, or includes inferences and characterisations of facts.

[15] In the first ground of appeal, the statement "that the appellant never acquired the disputed land as a gift *inter vivos* from his father who is still alive and yet his evidence was received by court," is both argumentative and narrative. In the second ground of appeal, the statement "holding that the respondent is the owner of the suit land, whereas not," is argumentative. The third ground of appeal is imprecise by reason of the fact that the averments following the phrase "at the *locus in quo*," are redundant.

[16] It is by way of written or oral submissions that counsel must identify any issues in the record of appeal that arguably support the grounds appeal and states why those issues either were wrongly decided, or lack merit, or would not alter the ultimate result. It is then the counsel is expected to present the material facts underlying the matter in controversy which are necessary to understand all grounds or issues presented for review, supported by references to pages in the transcript of proceedings, or the record on appeal, or exhibits, as the case may be, the arguments and authorities upon which the parties rely in support of their respective positions thereon.

[17] Parties and counsel should be mindful of the fact that appellate courts lack time to ferret out bright points buried in complex grounds and verbose arguments. The appellate court wants to be able to understand the argument quickly, and thus needs to quickly understand the most persuasive reasons for the appeal. Advocates need to do a better job at drafting grounds of appeal to help the court understand the accompanying argument more quickly, by achieving better organisation and clarity.

Grounds one and two; failure to find that the appellant had acquired land as gift *inter* vivid

[18] By the first and second ground of appeal, the trial court is criticised for his failure to find that the appellant had acquired the land as a gift *inter vivos* from his father who is still alive, despite having pleaded that he acquired it by inheritance, which was a drafting error in the pleadings. By virtue of article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995*) which enjoins courts to administer substantive justice without undue regard to technicalities, it is not desirable to place undue emphasis on form rather than the substance of the pleadings. Courts are not expected to construe pleadings with such meticulous care or in such a hyper-technical manner so as to result in genuine claims being defeated on trivial grounds. Courts have always been liberal and generous in interpreting pleadings.

[19] It was evident that the appellant's claim was premised on having acquired the land in dispute as a gift *inter vivos* from his father, D.W.2 Ayoo Stephen. It is well accepted law of interpretation of pleadings that a pleading has to be read as a whole. A word, phrase or paragraph cannot be considered in isolation. After reading the written statement of defence as a whole, I am left with no other alternative but to accept the contention of the appellant's counsel that the appellant's claim was premised on having acquired the land in dispute as a gift *inter vivos* rather than by inheritance. Reference t inheritance is clearly a drafting error. That is the only true sense of the expression "inherited the land from his father Ayoo Stephen who is still resident on the land." The court misdirected itself hen it found that the appellant contradicted himself when he and his father, D.W.2 Ayoo Stephen, testified that acquisition was by gift *inter vivos*.

[20] The respondent's case was that the appellant had exceeded the land given to his father, D.W.2 Ayoo Stephen, and encroached onto his land while the appellant's defence was that the land he is occupying is comprised in the 30 acres given to

him by his father. This therefore was not a dispute over ownership but rather the extent of each party's holding as marked by a boundary. The trial court misconstrued the nature of the evidence.

[21] This leads to the consideration of the third ground of appeal where the trial court is faulted for its failure to establish the true location of the common boundary, despite its visit to the *locus in quo*. It is trite that each parcel of land must be delimited by a boundary. From a legal perspective, a boundary is an invisible line on the surface that differentiates one set of real property rights from another. Whereas the physical demarcation of boundaries includes any activity for identifying a parcel of land and delineating its boundaries, performed by any of the parties related to the parcel, legal demarcation consists of reaching a social consensus on physical demarcation, such that it will be enforced *in rem*. A boundary line must have certain physical properties such as visibility, permanence, stability and definite location. Regardless of the nature of the boundary, evidence relating to the location of the boundary position should be sufficient to allow the boundary to be relocated should it somehow be destroyed.

[22] The actual physical location of a boundary line is normally demarcated in one of two ways: by point features such as monuments the straight line between which marks the divide between two properties, or by linear features such as walls, hedges and fences. It is a rule long since established that, if adjoining property owners occupy their respective holdings to a certain line for a long period of time, they are precluded from claiming that the line is not the true one, the theory being that the recognition and acquiescence affords a conclusive presumption that the used line is the true boundary. The time required to elapse before such a line is established as the common boundary, is the time necessary to secure property by adverse possession.

[23] It was the appellant's case that he had been in possession of the land in dispute, up to that line since the year 1977. D.W.2 Ayoo Stephen, the appellant's father,

testified that it is him who planted trees on the land, including; cashew nuts and orange trees planted during the year 1963, and mango trees in the year 1964. During the court's visit to the *locus in quo,* these trees were found to exist on the land. On the other hand, the respondent claimed that the appellant's activities on the land had begun only during the year 2015.

[24] It is apparent from the sketch map prepared during the visit to the *locus in quo* that a line of trees comprising two *Olam* trees and multiple (over twenty five) *Madalena* trees is to the East of the land separate the land in dispute from the respondent's un-disputed land to the West of the one in dispute. In his testimony, the respondent had claimed that the boundary is marked by mango trees, a *Mvule* tree, and orange trees planted by Gunya John and Akullo Evalyne. At the *locus in quo*, he was unable to demonstrate this. Instead the boundary proposed by the respondent comprised pine trees planted by the appellant that have no bearing to the un-disputed respondent's land to the West of the one in dispute. Had the trial Magistrate properly directed himself, he would have found that the respondent failed to establish his case against the appellant. In the final result, the appeal succeeds.

Order:

[25] Consequently the judgment of the court below is set aside and instead, since the respondent did not present any counterclaim, the suit is dismissed. The costs in the court below and of the appeal are awarded to the appellant.

Delivered electronically this 22nd day of May, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : Mr. Akena Kenneth

For the respondent : Ms. Kunihira Roselyn